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SERVICE DATE - OCTOBER 15, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 214X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN LANE, NESS AND RUSH COUNTIES, KS

STB Docket No. AB-853 (Sub-No. 2X)

KANSAS & OKLAHOMA RAILROAD, INC.—DISCONTINUANCE EXEMPTION—
IN LANE, NESS AND RUSH COUNTIES, KS

Decided: October 14, 2004

By petition jointly filed on June 29, 2004, Union Pacific Railroad Company (UP) and Kansas & Oklahoma Railroad, Inc. (K&O) (jointly, petitioners) seek exemption under 49 U.S.C. 10502 from the provisions of 49 U.S.C. 10903 for UP to abandon, and K&O to discontinue service over, a line of railroad extending from milepost 664.5, near Healy, to milepost 606.0, near McCracken, a distance of 58.5 miles in Lane, Ness and Rush Counties, KS. A request for issuance of a notice of interim trail use (NITU) and imposition of a public use condition was filed by Sunflower Recreational Trails, Inc. (Sunflower). We will grant the exemption subject to trail use, public use, environmental and standard employee protective conditions.

BACKGROUND

The line proposed for abandonment is one of the lines that UP leased to the Central Kansas Railway, L.L.C. (CKR) in October 1997.¹ In June 2001, K&O acquired substantially all of the assets of CKR, including the lease on the subject line.²

Petitioners state that K&O handled a total of 231 local carloads on the line in 2003, consisting primarily of outbound shipments of wheat and grain. This traffic was generated by three active shippers on the line: Farmers Coop Elevator & Merc. Assn. (Farmers Coop), Right

¹ See Central Kansas Railway, L.L.C.—Lease Exemption—Union Pacific Railroad Company, STB Finance Docket No. 33470 (STB served Oct. 9, 1997).

² See Kansas & Oklahoma Railroad, Inc.—Acquisition Exemption—Central Kansas Railway, L.L.C., STB Finance Docket No. 34030 (STB served June 12, 2001).

Cooperative Association (Right Coop), and Collingwood Grain, Inc. (Collingwood). Petitioners state that K&O realized total revenues of \$137,170 and incurred on-branch costs totaling \$366,020, in 2003, resulting in an avoidable loss of \$228,850. Petitioners indicate that the line also carried bridge traffic that can be rerouted over other K&O lines. The three shippers on the line have not objected to the exemption request or disputed the cost and revenue data submitted by petitioners.

Petitioners assert that alternate rail and truck service is available to shippers on the line, noting that K&O's main line runs parallel to the line about 10 to 15 miles south of it. K&O will also continue to operate rail lines to the west and east of the line, and these lines connect with the remainder of its system. Also, UP operates a main line that runs parallel to the line about 30 to 40 miles to the north, and serves a co-loading facility in Wakeeney that allegedly is already being used by some of the shippers on the line. Petitioners states further that there is an adequate highway network in the area, and that motor carrier service is available from several general commodity, heavy hauling and bulk carriers.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned or service may not be discontinued without the Board's prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The petitioners have established that K&O is incurring losses on the line, and will continue to incur losses until the line is abandoned and service discontinued. The line is not generating enough traffic to justify continued operation.

In these circumstances, detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will promote a safe and efficient rail transportation system, foster sound economic conditions in transportation, and encourage efficient management by relieving petitioners from the expense of retaining and maintaining a line with limited traffic and revenue [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. None of the current shippers have objected to the proposed abandonment and discontinuance. As noted, the petition indicates that shippers have alternative rail and motor

service alternatives available. Nevertheless, to ensure that the shippers are aware of our action, petitioners will be required to serve a copy of this decision on each shipper on the line within 5 days of its service date and to certify to the Board that they have done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979).

Petitioners have submitted an environmental report with their petition and have notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on August 27, 2004.

In the EA, SEA noted that the National Geodetic Survey (NGS) has identified 54 geodetic station markers along the line. Therefore, to allow time to plan for the relocation of the markers, SEA recommended that a condition be imposed requiring UP to notify NGS 90 days prior to commencement of any salvage activities that would disturb or destroy these markers.

No comments to the EA were filed by the September 27, 2004 due date. We will impose the condition recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Sunflower requests that an interim trail use/rail banking condition be imposed under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). It has submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service, as required under 49 CFR 1152.29. In a letter filed August 2, 2004, UP states that it is willing to negotiate with Sunflower for interim trail use.

Sunflower's request complies with the requirements of 49 CFR 1152.29, and UP is willing to enter into negotiations. Therefore, we will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, UP may fully abandon the line subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. Sunflower also requests imposition of a 180-day public use condition, precluding UP from: (1) disposing of the rail corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, culverts, ballast and rip-rap, but not removal of tracks, ties and signal equipment. Sunflower states that the corridor would make an excellent addition to the recreational trails system of the State of Kansas and would become part of the coast-to-coast American Discovery Trail. It also states that the corridor offers excellent wildlife habitat and viewing and will offer recreational facilities for several small towns.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. Sunflower has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, UP must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, UP is not required to deal exclusively with Sunflower, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 U.S.C. 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 10903 the abandonment by UP of, and the discontinuance of service by K&O over, the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that UP shall: (1) leave intact all of the right-of-way, including bridges, culverts, ballast and rip-rap (except track, ties and signal equipment), for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below; and (3) notify NGS 90 days prior to salvage activities to plan for relocation of the 54 geodetic station markers located along the line.
2. Petitioners are directed to serve a copy of this decision and notice on Farmers Coop, Right Coop, and Collingwood within 5 days after the service date of this decision and notice and to certify to the Board that they have done so.
3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.
4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.
5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.
6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line, provided the conditions imposed above are met.
7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by October 25, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective November 14, 2004. Petitions to stay must be filed by November 1, 2004, and petitions to reopen must be filed by November 9, 2004.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by UP’s filing of a notice of consummation by October 15, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary